No. 78-1738

In the Supreme Court of the United States

OCTOBER TERM, 1978

NATHANIEL SCHLESINGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 19, 1979. The petition for a writ of certiorari was filed on May 19, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's conviction must be reversed because the superseding indictment was returned by a grand jury that heard only a brief summary of the testimony before the original grand jury.

2. Whether petitioner was entitled to an instruction on entrapment when he alleged only that a corrupt government agent solicited a bribe from him for the agent's personal gain.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of endeavoring to obstruct justice by means of bribery, in violation of 18 U.S.C. 1510. He was sentenced to 18 months' imprisonment. The court of appeals affirmed (Pet. App. 1a-10a).

1. In January 1978, a three-count indictment was returned against petitioner and Eliezer Veiss. The first count of the indictment, which contained a lengthy and detailed narrative of the evidence, charged Veiss and petitioner with conspiracy to defraud the United States (Pet. App. 6a). The second count repeated these allegations and charged both defendants with attempting to obstruct justice by employing bribery (*ibid.*). The third count charged that petitioner had been an accessory after the fact to the smuggling offenses for which Veiss had previously been indicted (*ibid*).

Due to doubts about Veiss's competency to stand trial, the government subsequently obtained a severance of his trial from that of petitioner (*ibid.*). On the day scheduled for commencement of petitioner's trial, the government moved to dismiss the first and third counts of the indictment and to proceed against petitioner only on the obstruction of justice offense alleged in the second count (Pet. App. 6a-7a). The trial judge granted the motion to dismiss counts one and three and indicated that he regarded the first paragraph of the remaining count—which reiterated the allegations of the conspiracy

charge—as surplusage that he would not read to the jury (Pet. App. 7a). Petitioner's counsel objected, insisting that the count should be read to the jury in its entirety. The district court then proposed to read all of the second count and then to instruct the jurors to disregard the "descriptive material" contained in the first paragraph, but defense counsel objected to this approach as well (*ibid.*). At this point government counsel suggested the possibility that a superseding indictment could be obtained. The trial judge approved this proposal and granted a brief recess to allow the government to seek a superseding indictment from the grand jury (*ibid.*)

During the recess, the government attorney who had obtained the original indictment presented it to a new grand jury,[1] explained the need for a superseding indictment omitting the surplus language in the obstruction of justice count, and summarized the testimony of the witnesses before the original grand jury. He offered to have the transcripts read and gave the grand jurors the opportunity to examine them (Pet. App. 7a, 8a n.1). The grand jury then declined the invitation to have the transcripts read aloud, and it voted the superseding indictment (Pet. App. 7a).

2. The trial on the superseding indictment began that afternoon. The government's evidence showed that in November 1977, Veiss, an Israeli citizen, was arrested as he attempted to enter the United States, when a search by customs officials disclosed that he was carrying a quantity of diamonds that had not been declared (Pet. App. 2a). Veiss was indicted for smuggling, and he agreed, through his attorneys, to submit to a polygraph examination

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[1]The grand jury that returned the original indictment had been dismissed.

regarding his state of mind at the time of his entry into the United States. It was agreed that the government would consider the results of the examination in deciding whether to proceed with prosecution of Veiss (*ibid.*). The test was to be administered by Jessiah Jacobson, a Yiddish and Hebrew-speaking polygraph operator who was associated with a firm that had previously done work for the United States Attorney's office; Jacobson was deemed acceptable by both parties. At the behest of mutual friends,petitioner agreed to help Veiss defend against the smuggling charges, and accordingly petitioner accompanied him to Jacobson's office for the polygraph examination (Pet. App. 2a-3a).

The accounts of prosecution and defense witnesses differed sharply over events occurring during the testing session and immediately thereafter. According to the testimony of government witnesses, Jacobson determined that Veiss's exculpatory responses to test questions indicated deception (Pet. App. 3a). Jacobson went into another room, telephoned his conclusions to a customs officer investigating the case, and then returned to advise Veiss of the outcome (*ibid.*). Petitioner joined them, introducing himself as a go-between for persons of the Hasidic community who had dealings with government agencies (*ibid.*). Jacobson testified that petitioner first attempted to convince him that Veiss had been truthful and, failing that, then suggested that for the sake of the Jewish community Jacobson should nevertheless inform the United States Attorney's office that Veiss had passed the test (Pet. App. 3a-4a). Jacobson stated that when he refused to do so, petitioner offered to sell Jacobson the diamonds for an extremely low price or, alternatively, to pay Jacobson $25,000 in return for a favorable report (Pet. App. 4a). Jacobson stated that, in the face of petitioner's persistence and in order to convince him to leave, he told petitioner he would consider the offers (*ibid.*).

According to Jacobson, petitioner and Veiss returned later the same day, and petitioner promptly resumed his earlier attempts to induce submission of a false report. When petitioner offered to pay Jacobson $10,000 immediately at his business office, Jacobson excused himself, advised the United States Attorney's office of the proposal, and agreed to cooperate with the government by pretending to accept the bribe (Pet. App. 4a). Petitioner, Veiss, and Jacobson then drove to petitioner's office, where petitioner gave Jacobson $10,000 in cash (Pet. App. 5a).

Petitioner's version of these events was considerably different. Petitioner testified that he accompanied Veiss to Jacobson's office, where he overheard Jacobson and his assistant verbally abusing Veiss at the outset of the examination for having committed a "very big sin" and a "disgrace" by smuggling diamonds (Pet. App. 5a). When Jacobson emerged and announced that Veiss had failed the examination, petitioner requested that a second examination be conducted because the examiners had subjected Veiss to considerable stress during the first examination (*ibid.*). According to petitioner, Jacobson responded that he would only consider readministering the test in return for permission to purchase the diamonds at a nominal price (*ibid.*). Petitioner denied that he had the authority to sell Jacobson the diamonds, but stated that later that afternoon he had reluctantly agreed to pay Jacobson $10,000 to conduct a second examination (Pet. App. 5a-6a). He explained that he had accompanied Jacobson to his office because the latter insisted on immediate payment (Pet. App. 6a).

3. On appeal petitioner contended that the court of appeals should exercise its supervisory power to dismiss the superseding indictment because it had been procured solely on the basis of the prosecutor's hearsay summary of

the testimony before the first grand jury. The court of appeals rejected this contention, finding that the second grand jury had been well aware of the nature of the evidence before it and that there was "not the slightest doubt that the grand jury would have voted the superseding indictment if it had had, not a summary of their testimony, but the witnesses themselves before it" (Pet. App. 9a). The court also rejected petitioner's contention that the entrapment instruction had been improper, concluding (*ibid.*) that even viewing the facts in the light most favorable to petitioner, the entrapment defense had not been available to him.

ARGUMENT

1. Petitioner contends (Pet. 9-13) that the superseding indictment violated the Fifth Amendment guarantee that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury" because there was no evidence placed before the grand jury other than the prosecutor's unsworn summary of the original charges and testimony.

a. In *Costello* v. *United States*, 350 U.S. 359, 363 (1956), this Court squarely rejected the contention that the courts may review the sufficiency of evidence supporting an indictment:

> An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more.

More recently, in *United States* v. *Calandra*, 414 U.S. 338, 344-345 (1974), this Court reaffirmed *Costello*, holding that "the validity of an indictment is not affected

by the character of the evidence considered" and accordingly that a valid indictment is not subject to challenge "on the ground that the grand jury acted on the basis of inadequate or incompetent evidence," including illegally obtained evidence.

Since petitioner does not contend that the indictment in the instant case was facially invalid, the court of appeals properly concluded (Pet. App. 8a) that petitioner's claim did not require the court to look behind the indictment to determine whether it was based on sufficient evidence. See *United States* v. *Barone*, 584 F. 2d 118, 124 (6th Cir. 1978); *United States* v. *Mangan*, 575 F. 2d 32, 49 n.20 (2d Cir. 1978), cert. denied, No. 78-5004 (Oct. 30, 1978); *United States* v. *Brown*, 574 F. 2d 1274, 1275-1276 (5th Cir. 1978), cert. denied, No. 78-391 (Dec. 11, 1978); *United States* v. *Jett*, 491 F. 2d 1078, 1081-1082 (1st Cir. 1974).

In any event, the evidence relied upon by the grand jury that returned the superseding indictment was not insufficient. The prosecutor summarized the prior sworn testimony of three witnesses who had personal knowledge of the events, and he made the transcripts of the prior testimony available so that the grand jurors could test the accuracy of his summary. See *United States* v. *Bertolotti*, 529 F. 2d 149, 159 (2d Cir. 1975). The summary of the sworn testimony of witnesses with firsthand knowledge of the relevant events was more reliable than the testimonial evidence that was before the grand jury in *Costello*, which consisted of hearsay statements by three investigators, none of whom had any firsthand knowledge of the alleged transactions upon which they had based the computations supporting the charge of tax evasion. See 350 U.S. at 360-361. Moreover, in the instant case the grand jurors were aware of the fact that an earlier grand jury that had heard

this testimony firsthand had voted an indictment, and that the government was seeking only an indictment repeating the original charge, shorn of surplus allegations.

b. Petitioner contends (Pet. 10-11) that this Court should grant review to resolve a conflict between this case and *United States* v. *Hodge*, 496 F. 2d 87 (5th Cir. 1974). *Hodge* is a two-page per curiam decision requiring a remand for a factual hearing to develop the defendant's claim that the grand jury had before it only the prosecutor's unsworn summary of the evidence before an earlier grand jury. As the court below noted (Pet. App. 8a n.1), *Hodge* is factually distinguishable because there was no indication that the grand jurors were given any opportunity to inspect the transcripts or have the testimony read to them. But more importantly, *Hodge* is plainly inconsistent with *Costello* and *Calandra*; and indeed, even though *Calandra* was decided several months prior to the court's decision in *Hodge*, it is not mentioned in the court of appeals' opinion. Since the holding of *Costello* was reaffirmed in *Calandra*, and neither the Fifth Circuit nor any other court of appeals has followed *Hodge*, there is no necessity for review at the present time.

Moreover, even if this issue might otherwise merit review, the facts of this case make it an inappropriate vehicle to present this question. The government obtained the superseding indictment solely to avoid prejudice to petitioner. The original three-count indictment was concededly valid. But when the government elected to dismiss the counts charging petitioner with conspiracy and with being an accessory after the fact, it sought some means of eliminating the surplus allegations of conspiracy that had also been included in the remaining count on which the government intended to proceed, allegations that the government thought might be confusing and even inflammatory. The district court clearly had the authority

to strike the surplusage, since that action would not have altered or broadened the offense charged. See *Russell* v. *United States*, 369 U.S. 749, 770 (1962); *Salinger* v. *United States*, 272 U.S. 542, 548-549 (1926); *United States* v. *Lyman*, 592 F. 2d 496, 500 (9th Cir. 1978); *United States* v. *Burnett*, 582 F. 2d 436, 438 (8th Cir. 1976); *United States* v. *Sir Kue Chin*, 534 F. 2d 1032, 1036 (2d Cir. 1976); *Thomas* v. *United States*, 398 F. 2d 531, 536-540 (5th Cir. 1967).

Accordingly, the government originally proposed that the trial court strike the surplusage. This course—which would have been entirely proper—was rejected only because of the unwarranted insistence of petitioner's counsel that the entire second count of the original indictment, encumbered with references to his client's involvement in a conspiracy, be communicated to the trial jury. We cannot see how petitioner would have gained any advantage had this procedure been followed. The surplus allegations contained a complete narrative of the evidence supporting the charges that the government had agreed to dismiss. Since the superseding indictment is identical in all respects to the original indictment with the surplusage deleted, petitioner should not be heard to complain about the superseding indictment that was unnecessarily procured at his counsel's insistence.

2. Petitioner also contends (Pet. 14-16) that the court of appeals erred in holding that the entrapment defense is available only where a government agent induced the commission of the crime in order to obtain evidence for a prosecution, not where the agent acted for his own corrupt purposes. Petitioner's entrapment defense was founded on his allegation that Jacobson, a private polygraph examiner retained to question Weiss, had conducted the first polygraph examination improperly and then demanded a bribe to conduct a second, fair

examination. The court of appeals concluded (Pet. App. 9a-10a) that it need not reach petitioner's claim that the district court's entrapment instruction had been erroneous, because petitioner's allegations that Jacobson demanded a bribe "for his own corrupt purposes and not as evidence for the government" would, if true, establish a claim of extortion but not a claim of entrapment.

Assuming arguendo that Jacobson was acting as a government agent in his dealings with petitioner,[2] the court of appeals correctly ruled that petitioner was not entitled to an entrapment instruction. The entrapment defense bars prosecution when " 'the criminal design originates with officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission *in order that they may prosecute*.' " *United States* v. *Russell*, 411 U.S. 423, 434-435 (1973), quoting *Sherman* v. *United States*, 356 U.S. 369, 372 (1958) (emphasis added). Where, as here, the defendant claims that he acted in concert with a corrupt government agent who intended to engage in a criminal enterprise, not enforce the law by inducing the defendant to incriminate himself, the entrapment defense is inapposite. *United States* v. *Graves*, 556 F. 2d 1319, 1324-1326 (5th Cir.), cert. denied, 435

[2]In actuality, the record lends little support to the assumption that Jacobson was a government agent. The United States Attorney recommended that Jacobson act as the polygraph examiner because of his ability to speak Yiddish, and Veiss concurred (Pet. App. 3a). The parties agreed that Jacobson would serve as an independent examiner on behalf of both parties. The fact that the United States ultimately paid for the polygraph testing does not show that Jacobson was acting throughout as a government agent; indeed, it appears that there was no prior discussion as to who would pay Jacobson (Tr. 7, 15-17, 350-351). See *United States* v. *McClain*, 531 F. 2d 431, 437-438 (9th Cir.), cert. denied, 429 U.S. 835 (1976).

U.S. 923 (1977); *United States* v. *Koss*, 506 F. 2d 1103, 1112 (2d Cir. 1974), cert. denied, 421 U.S. 911 (1975). Accordingly, the trial judge would have been justified in disposing of the issue as a matter of law. See *Sherman* v. *United States*, *supra*, 356 U.S. at 377; *United States* v. *Wolffs*, 594 F. 2d 77, 80 (5th Cir. 1979).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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